

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 617 OF 1989



BETWEEN:

J J THORNCROFT.....PLAINTIFF

- and -

THE NCHIMA TEA AND TUNG ESTATES LIMITED.....DEFENDANT

CORAM: MTEGHA, J.
Makhalira, of Counsel, for the Plaintiff
Nampota, of Counsel, for the Defendant
Mthukane, Law Clerk
Longwe, Court Reporter

J U D G M E N T

In this action the plaintiff, J J Thorncroft, is seeking a declaration that his retirement from the defendant's employ on or about 18th November 1989 was invalid and in breach of the defendant's Pension and Life Assurance Scheme, plus damages.

It was the plaintiff's case that he was employed in 1968 by the defendant as a garage foreman. Part of the conditions of his employment was that he would join the Pension and Life Assurance Scheme which the defendant was running. It was his case that in pursuance of the said agreement, the plaintiff entered upon the said employment until 18th November 1988, when, in breach of the agreement, the defendant retired him without giving him gratuity and making him a pensioner, yet he had faithfully contributed to the Scheme.

It was his case that despite repeated requests, both orally and in writing, the defendant has wrongfully denied liability to pay the same. He is, therefore, claiming:

- (a) "A declaration that the retirement was invalid and is in breach of the Pension Rules applicable;
- (b) A declaration that the plaintiff is pensionable;
- (c) An order that the defendant do pay the plaintiff gratuity and pension; and



(d) Damages."

In his amended defence the defendant denies these allegations, and stated, inter alia, that it lawfully terminated the plaintiff's employment on 26th January 1989 and that the plaintiff was not entitled to gratuity and pension because the pension is paid by Old Mutual, but that the plaintiff has not exercised his rights under the Scheme. The defendant further pleads that at the request of the plaintiff, the defendant, on humanitarian grounds, continued to pay its own and the plaintiff's contribution until the date when the plaintiff reached the age of 55 years, and when the plaintiff attained the age of 55 years, he received his pension by cheque, dated 22nd October 1991.

It was the plaintiff's evidence that he was employed by the defendant in February 1968 as a garage foreman. In September 1988 he went on leave and when he came back to resume his work on 18th October 1988, he was called to the General Manager's office, who said that the defendant had decided to retire him in - early retirement. The reasons were not given to him, only that he had served them for a long time - 21 years. At that time the plaintiff was aged 52, and, according to the Pension Scheme, he would only go on early retirement if he was aged 55 years. The Pension Scheme Rules were produced as Exh. Pl. In the Pension Rules, "Normal Retirement Age" is defined as 60, and "Early Retirement Age" is defined as 55. It was the plaintiff's evidence that since he was only 52 years, he could not get pension and gratuity. He could, however, avail himself under Rule 7. Rule 7.1 stipulates:

"If a member leaves the Employer's service before retirement, he will have the following options:

1. CASH

The member may take in cash,

- (a) a refund of his contributions, made in respect of this fund, together with 4 per centum per annum compound interest thereupon, plus 100% of the total,

plus:

- (b) in respect of a member who was a member of the Old Mutual Fund his past period surrender value, determined as at the date of withdrawal.

OR

7.2 PENSION

The member may elect to receive a deferred pension payable from his retirement date. As at the date of member's withdrawal from service, the member's full equitable share plus the member's past period surrender value (if any) shall be utilised to secure The provisions of these Rules shall, mutatis mutandis, apply to the pension so secured."

Any option elected in terms of this Rule shall be irrevocable."

It was his evidence that he did not want to take this option and he refused. At this juncture, the General Manager said he would discuss his problem with the London Directors who were coming to Malawi in November. While waiting, he got a letter - Exh.P2. This letter, dated 18.11.88, stated

"Dear Mr Thornicroft
By hand
LIMBE

We refer to our conversation after your return from leave in which we discussed your early retirement.

The following payment has been decided;

4 months as notice pay which will be up to the end of the tax and pension year 1988/89.

The early retirement is according to the Pension Scheme in 3 years time. We will however, pay this in cash direct to you instead of into the Pension Scheme.

	<u>Pay</u>	<u>Pay</u>	<u>Pension Advance</u>	<u>Pay</u>
November leave				
pay	K1104.17	K253.42	K55.21	K250.00
	=====	=====	=====	=====
4 month notice	K4416.68	K1013.68	K220.84	K1000.00
	=====	=====	=====	=====

3 years Pension as should be paid in by the Company;

$K55.21 \times 2 = K110.42 \times 36 \text{ months} = \underline{K3975.12}$

After paying leave pay and notice pay there is still a balance on your advance of K1500.00. Advance August K3000.00. Deducted from October salary K250.00, November K250.00, 4 months notice K1000.00 - total K1500.00. Balance K1500.00 which will be a gift.

Total to be received:-

November salary balance	K 545.54
Notice pay 4 months	2182.16
3 years pension	3975.12
Advance balance	1500.00
Advance balance	<u>K8202.82</u>
	=====

We will inform the old Mutual that you are retiring and we have no objection if you request encashment. You are aware that there are two Pension Schemes in your name at the Old Mutual, one which was closed in 1981 and we presume with accumulated interest will be around Kw16,000.00 and the new which started in 1982.

We hope that you will vacate the house as soon as possible. Awaiting your reply."

It was his evidence that after receipt of this letter, he wrote back in reply. He stated:

"RE: EARLY RETIREMENT

I acknowledge with thanks receipt of your letter of 18 November 1987 in connection with the above matter.

I would like to say at the outset how grateful I am for your decision to retire me and in particular for undertaking to write-off the balance of the advance I had with the Company. On perusing the rules governing the Nchima Tea Estates Local Staff Pension Scheme, I discovered that there is no way I can be retired at the age of 52 unless on medical grounds. Consequently, I will not be able to enjoy any benefits other than, of course, a refund of my own as well as the Company's contributions. In other words and for all practical purposes, it is as if I am voluntarily resigning from the employment of the Company and all I get are withdrawal benefits. Please see Regulation 7.1.1 of the Pension Scheme Rules.

In order for me to qualify for early retirement and hence be entitled to retirement benefits, I should be at least 55 years of age and should have been a member of the Pension Scheme for a period of at least 5 years. Please refer to Rule 5.1(ii). In the premises, I propose that I continue to be in the Company's service until my attainment of the age of 55 years. I fully appreciate that I could not be expected to actually report for

work following your decision to retire me but I could possibly remain on your payroll and continue to receive my salary up to age 55. Alternatively, you may decide to pay my salary in one lump sum for the remaining 3 years. I would in such a case arrange for the payment of the contributions to Old Mutual.

As for the house, I will arrange to vacate it as soon as we have been able to resolve the within matter."

It would appear that after receipt of this letter the defendant wrote to Old Mutual and received a reply from them dated 13th December 1988. The letter stated:

"NCHIMA ESTATES PENSION SCHEME
REF: 16 MR J J THORNICROFT AND QUOTE

Following your inquiry concerning the ill health early Retirement quotation for Mr Thornicroft, were he to be retired on 1st April 1989; we quote as follows:

1. Full Pension = K4 311,12 per annum
or:
2. He could take a cash benefit of 1/3 of the value of pension i.e = K10 367,26 thereafter receive 2/3 balance pension of K2 865,96 per annum.

The pension would be payable monthly in arrears and would be guaranteed for five years, but payable for as long as the member is alive.

The above figures are for quotation purposes i.e. the final figures could be different."

A copy of this letter was sent to the plaintiff by the defendant under cover of the defendant's letter dated 19th Decemember 1988, in which the defendant also asked the plaintiff to choose one option. It was the plaintiff's evidence that he refused to take any option and wrote them in the following terms in his letter dated 23rd December 1988:

"Re: EARLY RETIREMENT

Thank you for your letter of 19th December, 1988.

On studying the quotation from Old Mutual it is clear that the assumption is that I would go on early retirement on the basis of ill health.

In accordance with Rule 5.1.1(ii) of the Rules governing the pension scheme, I would have to submit to medical examination and certificate given to the effect that I am incapable of performing my normal gainful employment. Of course, it is not true that I suffer from any pathology that would render me incapable of performing my duties. As a matter of fact I have never been in better health for a long time.

In the circumstances I request that consideration be given to the two proposals contained in the third paragraph of my letter to you of 24th November, 1988. This matter is now being protracted. You will appreciate that I am presently uncertain of my future. I ask for your indulgence that a decision with regard to my above two proposals be made soonest as to bring this matter to a close."

At this stage things began to sour. The defendant wrote in these terms:

"Dear Mr Thornicroft,

We were requested by your Dear Wife to retire you if possible due to your ill health.

Also I like to point out that we have been paying a health loading premium for you from February, 1987. However, we are glad to note that "you have never been in better health for a long time". This pleases us very much because it means you can enjoy your pension in good health which is much better than being sickly and unable to move around.

I am sorry to disappoint you, but no consideration can be given to your proposals as mentioned in your letter. The condition and terms are clearly stated in our letter dated 18th November 1988.

Regarding the house; we should like to have the house vacated at the latest on the 15th January 1989. If you are unable to store your "katundu" we will store it for you in one of our stores until such time you are able to."

Being not satisfied, the plaintiff finally consulted legal advice from Lilley Wills & Company and the lawyers wrote to the defendant in these terms:

"Dear Sir

RE: MR J J THORNCROFT VERSUS YOUR COMPANY

The correspondence which have passed between yourself and our client Mr J Thorncroft have been passed on to us with instructions to pursue the matter of his early retirement on his behalf.

We have thoroughly perused all the correspondence and what emerges is that you originally sought to give our client an early retirement but when he pointed out that this could not be done in view of the Pension Fund Rules, you have attempted to retire him on health grounds. We must point out quite clearly that your allegation that his wife approached you with a view to have her husband retire on health grounds is denied as patently false and preposterous. Our client's wife denies this totally and even if she had made any such request, the same would have been done without his authority and could not legally bind him. Happily for our client this is denied by his wife.

Our client has made it perfectly plain to us and indeed to yourself that he is not a sick man and consequently he cannot retire on health or medical grounds. Our client cannot obtain a false medical certificate that he is sick when he is not nor can he give false information to any doctor regarding his health. Indeed we cannot expect a company of repute and standing like yours to expect our client to obtain a false certificate for the sole purpose of getting the Pension Fund benefits.

This being the case it is quite clear that our client cannot retire as envisaged by your Company but since it appears your Company wants our client to go, then it seems to us that you either pay his and your Company's contributions for a three year period directly to the Pension Fund and pay his salary for the same period, or pay his and your Company's contributions to the Pension Fund for three years plus a reasonable lump sum to him which will enable him survive the three year period until he reaches the early retirement age and be entitled to the Pension Fund benefits, or you take him back into employment for three year period. Our client prefers the above options in the same order in which they have been

mentioned. The last one is dangerous because your Company can find excuses to subsequently dismiss him.

Would you please let us have your Company's view on the foregoing but we must mention that your views as contained in your letters of November 1988 and 4th January 1989 are totally unacceptable and if insisted upon will almost inevitably lead into expensive litigation.

The defendant retaliated by terminating the plaintiff's employment by a letter dated 26th January 1989, in these terms:

"Dear Mr. Thornicroft,

RE: TERMINATION OF EMPLOYMENT

We refer to previous correspondence and Messrs Lilley Wills and Company letter of the 13th January, 1989.

We have to advise you as follows:-

1. All offers contained in previous correspondence are hereby withdrawn.
2. We terminate hereby your employment as from today and in lieu of notice pay you three months salary.
3. Therefore the amount due to you is as follows:

	<u>Salary</u>	<u>Tax</u>	<u>Pension</u>	<u>Nett Pay</u>
January	K1104.17	253.42	55.21	795.5
three months in lieu of notice	<u>3312.51</u>	<u>760.26</u>	<u>165.63</u>	<u>2386.62</u>
TOTAL	<u>4416.68</u>	<u>1013.68</u>	<u>165.84</u>	<u>3182.16</u>
Less: outstanding debt of				<u>2250.00</u>
Balance Due to you				<u>932.16</u> =====

Please find enclosed our cheque No. 503506 of K932.16 dated 26 January 1989 as a full and final settlement.

We will inform the Old Mutual that your service has been terminated and will pay your pension up to the end of April 1989. Also that we have no objections to you obtaining in cash the amount due to you under the pension scheme regulations."

The plaintiff was not satisfied and on 6th February 1989 he wrote them. The letter stated:

"Dear Sir,

RE: TERMINATION OF SERVICE

With regret I do not accept the contents of your letter dated 26th January, 1989 and I therefore return to you herewith by cheque no. 345264 the sum of K386.62. (Being supposedly the balance of Notice Pay after deductions of Tax, Pension Contribution and Loan account as per your letter).

I have retained my January salary K545.54 which was included on your cheque no. 503506 enclosed in your letter and of course less the loan account instalment as usual (K250)."

It was the plaintiff's evidence that he never told his wife to tell the defendant that he wanted to retire on ill health. In fact, the information that he was sick is not correct. It was his evidence that he is claiming damages from January 1989 to September 1991. This was the plaintiff's evidence in chief, but in cross-examination a number of points came out. The plaintiff conceded that he went to the Malawi Congress Party to complain about the termination of his employment; he conceded that the defendant paid, during this period, his personal contribution and the Company's contribution, from 1988 until 1991, when he attained the age of 55; that he has, as of now, got his gratuity and that he will be receiving pension every month. He conceded that if he wanted to leave the defendant's employ, he would give three months' notice and that his employer could do the same if it so wished.

The first witness for the defendant was Mr Andrews Steer Chapuma, of Old Mutual. He is the Administrative Manager, Pension Department. His evidence was to the effect that the plaintiff has now retired - early retirement as evidenced by Exh.D1 dated 21 October 1991. It states:

"Dear Sir

NCHIMA TEA ESTATES PENSION SCHEME
REF 16 - MR J J THORNICROFT

We refer to the Notification of Retirement dated 19 September 1991 and are pleased to advise that the calculation of retirement benefits has been finalised.

He is to receive a one-third cash commutation amounting to K17,381.41 and a monthly pension of K411.56 payable in arrear with effect from 01 October 1991. A tax deduction of K31.39 will be made. The monthly pension is guaranteed for 5 years and thereafter is payable for as long as the member is alive.

Enclosed is our cheque for his one-third cash commutation of K17,381.41 for passing on to the member. His monthly pension will be sent under separate cover to his account at National Bank of Malawi, Churchill Road Branch.

Kindly note that this pension is purchased by both the past service account and the future service account, i.e. K32,976.67 from the past service account plus K19,167.56 from the future service account produced K52,144.23 from which the cash commutation is deducted and the balance of which purchases the monthly pension."

Accordingly, a cheque for K17,381.41 was paid to him as gratuity. He also explained the effect of rule 7.1 of the Pension Scheme Rules. It was his evidence that the plaintiff could not get gratuity or pension before he reached the age of 55, at the earliest.

The second witness for the defendant was William Frank Paterson. It was his evidence that he is General Manager for the defendant since October 1989, having joined the Company in March the same year. When he joined, he did not find the plaintiff, but found his personal file. It was his evidence that when the defendant wants to terminate the services of an employee, no reasons need be given, and in the instant case, he found records which showed that the plaintiff's services were terminated in January 1989. The records also show that the plaintiff was paid three-month salary in lieu of notice - because of the Company's generosity for his long service. However, the plaintiff did not accept this and sent back the cheque through Ex.D4. It was his evidence that the offer of retirement dated 18th November 1988 was also not accepted by the plaintiff. Through the generosity of the defendant, the plaintiff was paid salary between November 1988 and January 1989, after which his services were terminated. As a result, he went to complain at the MCP. Because of the complaint which the plaintiff made to the MCP, a meeting was held between the MCP, the defendant and the plaintiff. The outcome of the meeting was recorded in Ex.D5 by the Chief Executive Officer at the MCP in his letter dated 27th February 1989. This letter, Ex.D5, stated:

"The General Manager,
Mchima Tea and Tung Estate,
P.O. Box 52,
THYOLO.

cc : Mr J.J. Thornicroft,
c/o Miss C.C. Thornicroft,
P.O. Box 1961,
BLANTYRE.

TERMINATION OF EMPLOYMENT: MR. J. J. THORNICRAFT

I write to confirm our discussions of today between the General Manager (Mchima estate) Mr. and Mrs. Thornicroft and the undersigned over the termination of employment of Mr. Thornicroft.

The main issue of our discussion was that Mr. Thornicroft has served Mchima Estate continuously for Twenty one (21) years. He should have qualified for early retirement age in about two to three years time for him to qualify for Pension with your Insurers, Old Mutual.

Mr. Thornicroft's claim that he should be paid for the 2 to 3 years while not working for your Estate was not accepted. Likewise, that your Estate should pay him Pension.

It was resolved that Mr Thornicroft will drop sueing your estate through his lawyers which he had already began. Secondly, your estate will pay lump sum for about two to three years premiums to Old Mutual to enable Mr. Thornicroft qualify for his early pension as he has opted Pension than to receive lump some money. The new stake with Old Mutual after the premiums have been paid do not concern Mchima Estate.

Thirdly, due to the long service which Mr. Thornicroft has rendered to Mchima Estate for 21 years, the estate ought, on humanitarian grounds, give ex-gratia payments in a form of gratuity to Mr. Thornicroft.

I trust these things will be done so that this case can be closed."

It was this witness's evidence that on 19th April 1989 the then General Manager wrote to the MCP. The letter was couched in the following terms:

"The Chief Executive Officer
Malawi Congress Party
Regional Headquarters
P.O. Box 916
Blantyre. For Attention Mr. Katandula

Dear Sir,

TERMINATION OF EMPLOYMENT MR. J.J. THORNICROFT

We refer to your letter dated 27th February 1989 and Mr. Thornicroft's letter dated 29th March 1989. Taking in consideration and calculation we have come to the following:-

6 months salary	: 6 x K1104.17	= K6625.62
6 months pension	: 6 x K 110.42	= K 662.52
6 months health Loading	: 6 x K 1.66	= K 9.96
Total already paid		= <u>K7298.10</u>
		=====

Mr. Thornicroft is due for pension 1st September 1991 which is 28 months.

As suggested in your letter the company pay for his pension which will be:

28 months pension	: 28 x K110.42 by company	= K3091.76
28 months health loading	: 28 x K 1.66 by company	= K 46.48
28 months pension	: 28 x K 55.21 by Thornicroft	= <u>K1545.88</u>
Total to pay towards pension		= <u>K4684.12</u>
		=====

Mr. Thornicroft retirement will start at the first of September 1991 and will be payable monthly in arrears.

Due to the above explanation and the full pension to be paid to Mr, Thornicroft there cannot be any grounds to give an ex-gratia payment."

It was his evidence that the defendant paid the contributions for 28 weeks until the plaintiff qualified for early retirement and Old Mutual gave him his gratuity and he is, as of now, on pension. The plaintiff has, therefore, no claim against the defendant.

This then is the evidence before me.

It has been conceded by Mr Makhalira, learned Counsel for the plaintiff, that due to time factor, the gratuity has been paid and pension will be paid. Therefore, these claims, itemised as (a) to (c) fall away.

It is Mr Makhalira's contention that the plaintiff was wrongfully retired, since his retirement was in breach of Pension Scheme Rules, therefore, the plaintiff is entitled to damages. The damages, Mr Makhalira submits, are what he would have received as pension from January 1989 to September 1991, when he got his lump sum and began to get his pension.

I do not appreciate this reasoning. All the evidence so far shows that the plaintiff was not retired at all, but his services were terminated at the end of January 1989. Between November 1988 and January 1989 the defendant was offering him options as to what the plaintiff would prefer. He could not get a pension or gratuity at that time because he did not qualify under the Pension Scheme Rules.

In fact, it was due to the kindness of the defendant that the plaintiff even got the K7,000.00. Even if the plaintiff was retired, he would not be entitled to anything more than what was stipulated in Rules 7.1 and 7.2 of the Pension Scheme Rules as set out above.

Even if he was retired, I do not think that such retirement was wrongful. The mere fact that one is on pensionable employment does not mean that he cannot be retired or let alone not have his services terminated in a proper case. Permanent and Pensionable employment does not mean life employment - see the case of Msatekeseka and Mangochi -v- Encor Products Ltd, Civil Cause No. 598/87 (unreported). In the case of MacClelland -v- Northern Ireland General Health Services Board (1957) 2 All ER 129, Lord Goddard put it succinctly when he said:

"That an advert offers permanent employment does not, in my opinion, mean thereby that employment for life is offered. It is an offer, I think, of general as distinct from merely temporary employment.....with an expectation that, apart from misconduct or inability to perform the duties of his office, the employment would continue, (but) is always liable to be determined by reasonable notice. Nor do I think that, because a person is offered pensionable employment, the employer thereby necessarily engages to retain the employee in his service long enough to enable him to earn a pension."

The position in the instant case is the same. The defendant was entitled, as Mr Nampota, learned Counsel for the defendant, rightly pointed out, to terminate the plaintiff's employment on proper notice. This they did, and I must commend the defendant in that it went all the way to please the plaintiff. In fact, I have yet to see another employer who could pay pension contributions for an employee whom it has terminated his services for a period of three years just to enable the employee to get his pension. The plaintiff,

therefore, for these reasons, is not entitled to damages at all. I dismiss this action with costs.

PRONOUNCED in open Court this 29th day of November 1991, at Blantyre.


H M Mtegha
JUDGE